Supreme Court, U.S.
FILED
DEC 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-258

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,
v.
AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND ITS AFFILIATED LOCAL UNIONS 324 AND 770 AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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With written consent of petitioner and respondents, filed concurrently herewith, the United Food and Commercial Workers International Union (UFCW), UFCW Local Union 324 (Local 324), and UFCW Local 770 (Local 770), as *amici curiae*, present this brief in support of respondents' position that the decision of the Court of Appeals for the Ninth Circuit, overturning the preliminary injunction ordered by the District Court for the Central District of California, should be affirmed.

INTEREST OF AMICI CURIAE

The UFCW is an international labor union, affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Canadian Labour Congress (CLC), having a total membership of over one million wage-earners throughout the United States and Canada. It and its chartered local unions represent, as exclusive representatives for purposes of collective bargaining within the meaning of Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a), employees of supermarket chain stores, independent retail grocery stores, and other retail food outlets throughout the United States.

UFCW Locals 770 of Los Angeles and 324 of Buena Park are the two largest UFCW local unions in California. Together with their other sister locals in the state, they represent nearly all of the employees of the major supermarket chains directly or indirectly interested in the outcome of this case, including Vons Grocery Company, Safeway Stores, Lucky Stores and Alpha Beta, among others. The unions submit this *amicus curiae* brief to bring to the Court's attention the severe adverse effect of the district court's preliminary injunction on the more than 30,000 employees of Alpha Beta and Lucky Stores in southern California.

Corporate mergers and acquisitions in any American industry often create serious challenges to employees' collectively-bargained rights. In recent years workers in the retail food industry have borne their share of the impact of such mergers. They thus have become deeply and justifiably concerned about securing protection against such adverse economic consequences as: (1) impairment of job security resulting from reductions in the labor force of the newly-combined enterprise; (2) loss of established company, departmental and/or classification seniority rights acquired through years of service; (3) withdrawal of continuous-service participation and benefits accrual in employee pension plans or group health-care plans; (4) interruptions of periods of unbroken service which can jeopardize paid-vacation rights; (5) reduction in guaranteed hours of employment and reductions from full-time to part-time status; (6) new apprenticeship or probationary periods imposed by the successor employer; (7) displacement from continued work opportunities in higher-paid job classifications or preferred departments; (8) reduction of opportunities for future job promotion; and (9) arbitrary operational transfers from workplace to workplace.

While these effects can be felt in any major corporate restructuring, they can be badly exacerbated where, as here, the merger is completed and approved by the federal government (subject to some divestiture), the unions rely on that resolution and attempt to protect their members' jobs and benefits through collective bargaining, and *then* a state attorney general challenges the merger anew, threatening an additional divestiture order.

The effect upon employees can be seen by comparing the two major mergers recently experienced in the southern California retail food industry. As alleged in the complaint, on or about December 3, 1987, Vons Grocery Company, operating approximately 183 supermarkets in California, entered into an agreement for purchase of the southern California division of another chain, Safeway Stores, Inc., consisting of 172 supermarkets. The merger was consummated in late August, 1988 and received final approval by the Federal Trade Commission (FTC) on August 31, 1988, the very same day the FTC gave final approval to the Lucky/Alpha Beta merger at issue here.[1] The California Attorney General did not challenge the FTC approval of the Vons/Safeway merger

[1] 697 F.Supp. 1125, 1127.

either before or after consummation. The UFCW local unions were thus free to collectively bargain an agreement with Vons protecting the economic rights and interests of the employees of the newly-acquired Safeway supermarkets.

So too, in Nevada, Alpha Beta and Lucky operations were allowed to merge pursuant to the same FTC order of August 31, 1988. Neither the Nevada Attorney General nor any other Nevada party challenged the merger either before or after consummation, and the UFCW unions were able successfully to reach an agreement on the effects of the merger, including terms governing seniority, scope of the bargaining unit, successorship and the like.

The Lucky/Alpha Beta merger in California stands in sharp contrast to these definitive resolutions. Despite being given notice and the same merger information supplied to the FTC, the petitioner waited until *after* consummation of the merger and *after* a tentative FTC consent order was approved to challenge the merger. See respondents' Brief, Statement of the Case. In substance, on September 1, 1988 the California Attorney General filed a lawsuit seeking to "undo" what he had knowingly but silently watched become "done" in a final consent order by the federal government. As the court of appeals observed: "California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed [but] . . . chose not to do so." 872 F.2d at 846.

By consciously delaying the commencement of this action for several months, the petitioner improperly interfered with and disrupted the unions' efforts to protect the rights and interests of the Lucky/Alpha Beta employees through collective bargaining. Commencing in July, 1988 the UFCW local unions, including Locals 324 and 770, met on at least ten occasions with Lucky/Alpha Beta representatives in an attempt to reach an understanding on the effects of the merger and to provide for

continued job security of employees. Agreement was reached on a "dovetailed" seniority list, the probationary period for the employees of the merged entity, and a procedure for crediting employees' earned vacation time with the predecessor employers. All of these commitments, however, had to be conditioned upon the final disposition of the instant litigation, and other equally pressing issues could not be even tentatively resolved.

Thus, the preliminary injunction which issued on September 29, 1988, requiring American Stores to hold its Alpha Beta and Lucky operations separate in California and prohibiting it from taking any further steps to integrate these operations, placed a dark cloud of uncertainty and instability over the economic future of tens of thousands of supermarket employees. Quite apart from the devastating impact on employee morale and collective bargaining, the "indirect divestiture" order has made it extremely difficult for the local unions to refer to American Stores unemployed, competent and experienced retail clerks and meat cutters within their memberships.[2]

In sum, the "indirect divestiture" decree forbidding integration of two supermarket operations owned by a common owner, and the looming possibility of a final judgment requiring divestiture or dissolution, has left over 30,000 Lucky/Alpha Beta employees in an economic limbo. As the statutory bargaining representatives

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[2] The adverse impact of the preliminary injunction upon northern California employees was recently eliminated when the district court approved a stipulation for modification of the preliminary injunction on November 7, 1989. This modification permits the collective-bargaining parties to implement any agreement reached between them providing a stable work environment for employees of the 23 remaining Alpha Beta stores in northern California. These Alpha Beta stores have been allowed to be integrated into Lucky Stores operations. Of course, this stipulation neither affects the 257 Lucky and Alpha Beta stores in southern California nor the legal issues presented to this Court.

of these employees, the unions have been prevented from concluding and implementing an agreement to protect their rights and interests. For these reasons, UFCW and its Local Unions 324 and 770 ask to be heard as *amici curiae* in this case.

SUMMARY OF ARGUMENT

The union *amici curiae* address here only the narrow issue of whether a state attorney general can sue to obtain the remedy of divestiture under § 16 of the Clayton Act where: (1) the notice and waiting procedures of the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) have been followed; (2) the federal government has issued a final consent order approving the merger; (3) the state attorney general has declined to file a pre-merger lawsuit; and (4) the unions who represent the employees of the merging companies have relied on the federal resolution and have obtained some protection from the consequences of the merger for those employees through collective bargaining.

Allowing a private divestiture remedy in these circumstances would fatally undermine the very purpose and goal of the HSR Act, which is to resolve antitrust challenges *before* the consummation of the merger in order to *avoid* the need for the drastic and disruptive remedy of divestiture. Employees, such as those represented by UFCW here, are entitled to enjoy the finality and certainty which Congress intended for all members of the business community under the HSR Act, and should not be subject to the unnecessary economic uncertainty and instability which a divestiture order would bring in a case like this.

Moreover, allowing a state attorney general to sue for divestiture under these circumstances would conflict with the stated goal of the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*) to promote industrial peace through

free collective bargaining. The threat of a private divestiture remedy issuing after the federal government has finalized a consent order, upon which the employees' unions have justifiably relied, makes it impossible for unions to effectively fulfill their statutory duty to represent employees in collective bargaining and to protect them, as best they can, from the adverse employment consequences of corporate mergers.

ARGUMENT

I. CONGRESS DID NOT INTEND TO ALLOW STATE ATTORNEYS GENERAL TO SUE FOR DIVESTITURE WHERE THE PRE-MERGER NOTICE PROCEDURES OF THE HART-SCOTT-RODINO ACT HAVE BEEN FOLLOWED AND A FEDERAL CONSENT ORDER HAS BEEN EXECUTED

This Court has recognized that a judicial order of divestiture of corporate stock or assets is a remedy "extreme even in its mildest demands," *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 46 (1918), requiring a "surgicial ruthlessness" to undo an already-consummated economic transaction upon which many persons may have relied as final. *See United States v. E.I. Du Pont de Nemours and Co.*, 366 U.S. 316, 363-64 (1961) (Frankfurter J., dissenting), *quoting United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 348 (D.Mass. 1953), *aff'd*, 347 U.S. 521 (1954). The forced sale of the stock or assets of any corporation necessarily has an "inevitable impact far beyond the interests of the immediate parties." 366 U.S. at 358. Indeed, for the employees represented by the union *amici* here, the prospect of corporate divestiture threatens their very livelihood.

While petitioner California and respondent American Stores argue the point whether divestiture is *ever* an available private remedy under Section 16 of the Clayton

Act, the union *amici* emphasize here a narrower point specific to this case: that Congress certainly could not have intended that such a drastic and disruptive remedy be available to private parties where (1) the notice and waiting procedures of the Hart-Scott-Rodino Antitrust Improvements Act have been followed, (2) the federal government as the protector of the national public interest has executed a final consent order after fair notice to and comment by the general public, and (3) the state attorney general has been given an opportunity to commence a less disruptive pre-merger lawsuit for preventive relief but has declined. In these circumstances, allowing a state attorney general, or any other private party, to seek to "undo" a merger after it has been formally approved by the federal government and consequently consummated would negate the very purpose of the HSR Act and subject employees, such as those represented by UFCW, to a prolonged period of uncertainty and adjustment.

The HSR Act creates a comprehensive notification procedure and waiting period to allow for federal administrative review of contemplated corporate mergers and acquisitions *before* they are consummated.[3] The express

[3] Section 7A of the Clayton Act, as amended by the HSR Act, provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired . . . ." 15 U.S.C. § 18a(a). Subsection (d)(1) requires that corporations involved in contemplated mergers provide notice to the Federal Trade Commission and the Assistant General along with such documentation "as is necessary and appropriate to enable [them] to determine whether such acquisition may, if consummated, violate the antitrust laws. . . ." Subsection (b)(1) provides for a 30-day waiting period commencing on the date of receipt of the completed notification and ending on the 30th day thereafter, subject to an extension of 20 additional days. 15 U.S.C. § 18a(b)(1), (e)(2).

purpose of these amendments is to "advance the legitimate interest of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 2637, 2643. The goal is to avoid the disruptive and often futile task of "unscrambling the egg" in the form of a post-consummation divestiture order. *See* 10 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* at 7 (1985).

Indeed, in passing the HSR Act, Congress specifically considered giving state attorneys general the right to sue for divestiture, but rejected the proposal as inconsistent with the Act's overall enforcement scheme. While the law ultimately enacted allows state attorneys general, acting in their *parens patriae* capacity, the right to obtain treble *monetary* damages on behalf of their constituents, the original Senate bill had proposed granting the state law enforcement officials broader authority to seek both "monetary *and other* relief." S. Rep. No. 1284, 94th Cong., 1st Sess. 401 (1976) (emphasis added). The Senate Report on this provision stated:

> Present section 16 of the Clayton Act allows private suitors "injunctive relief against threatened conduct that will cause loss or damage" by a violation of the antitrust laws (15 U.S.C. § 26). [The Senate bill] is intended to *insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment*, which may be appropriate remedies under certain circumstances, *whether or not it fits within the traditional concept of "equitable relief" or "injunctive relief."*

S. Rep. No. 803, 94th Cong., 2d Sess. 45 (1976) (emphasis added). The House version of the bill, on the other hand, provided only for damages.

Faced with this direct conflict between the House and Senate bills, the conference committee adopted the former. Representative Rodino explained:

> [T]he compromise bill omits any reference to [injunctive relief] solely because such relief is already available to State attorneys general, acting as parens patriae in injunctive actions under [section 16]. The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. *Provision for* [*broader*] *equitable relief, that is, decrees of divestiture, was squarely rejected by the House conferees in the belief that State attorneys general should not be authorized to file parens suits seeking divestiture.*

122 Cong. Rec. H10295-96 (daily ed. Sept. 16, 1976) (emphasis added).

Where Congress specifically voices its approval of an interpretation of statutory language in the course of reenacting and amending a statute, "Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 134 (1978). This conclusion is especially compelling where, as here, the two Houses of Congress propose competing bills on the issue and the entire Congress adopts one of them. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). *See also Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). *Compare Pierce v. Underwood*, —— U.S. ——, 108 S.Ct. 2541, 2550-51 (1988) (contrary result where, unlike here, "no indication whatever in the text or even the legislative history of the . . . reenactment that Congress thought it was doing anything insofar as the present issue is concerned. . . ."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971) (same, respondent "can point to no direct evidence that

Congress ever considered the issue" before the Court). It is thus very clear here that Congress specifically considered the issue and decided to *withhold* from state attorneys general the remedy of corporate divestiture.

Congress indeed *had* to reject the Senate bill if the HSR Act was to have its intended purpose and effect. The HSR amendments created a mechanism designed to avoid the necessity of the post-merger disruption and dislocation which can be caused by dissolution or divestiture. As in this case, the HSR Act requires that those contemplating a major corporate acquisition notify the federal government and provide such information as is necessary and appropriate to determine "whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1). This notice triggers, as it did here, an intensive investigation by the FTC, the federal agency charged with the responsibility for protecting the national public interest in interstate commerce, and a determination whether that public interest requires action. If the FTC or Assistant Attorney General concludes that enforcement action is required and administrative or judicial proceedings are commenced, the government may seek corporate divestiture. 15 U.S.C. §§ 21(b), 25.

If, however, the federal government determines that the merger does not violate the antitrust laws it must publish a notice to that effect in the Federal Register. 15 U.S.C. § 18a(b)(2). Alternatively, should it decide that certain concessions will eliminate a potential antitrust violation, it can negotiate a provisional consent order which also must be published in the Federal Register subject to public comment for a period of 60 days before becoming final. 16 C.F.R. §§ 2.31-2.34.

Were private parties, including state attorneys general, authorized to sue to divest corporate assets or to "undo" a consummated merger after the federal government has negotiated a settlement requiring some corporate divestiture, the whole point of the HSR amendments would be

lost. There would be no pre-merger resolution of antitrust issues and certainly no advancement of the "legitimate interest of the business community in planning and predictability." A divestiture challenge could come from one or more of the 50 state attorneys general, or indeed from any number of competing private businesses, seeking to unravel what the federal government as the primary enforcer of the antitrust laws has already declared meets its antitrust scrutiny. Parties to a corporate acquisition and, most important to these *amici curiae*, the employees of those corporations who are vitally affected by the decisions made in the corporate board rooms and who thus must be considered part of the "business community" with which Congress was concerned, could not rely on the federal government's negotiated order as final. As a result, the pre-merger investigation and resolution made possible by the HSR Act would be rendered effectively meaningless.

As this Court has recognized, "[t]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these." *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954), *quoting United States v. Bendix Home Appliances*, 10 F.R.D. 73, 77 (S.D.N.Y. 1949). "[I]t is the Attorney General and the United States District Attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *Borden*, at 518. Thus, a determination by the Federal Trade Commission and the United States Attorney General regarding whether and to what extent the public interest requires divestiture should be entitled to substantial deference.

Indeed, a report of the Attorney General's National Committee urges federal antitrust enforcement officials to consider the effect of the divestiture remedy "*on the public* as well as the defendant and persons interested in it,

[such] as investors, customers *and employees*. Such appraisal," the Committee emphasized, "seems a *primary responsibility* of any antitrust enforcement agency." *Report of the Attorney General's National Committee To Study The Antitrust Laws*, at 356 (March 31, 1955) (emphasis added). While private enforcement does serve an important role in the statutory antitrust scheme, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), private parties, including state attorneys general with more local concerns and constituencies at heart, should not be allowed to second-guess the federal government on the needs of the *national* public interest.

The goal, then, of "accomplishing [the remedial] result with as little injury as possible to the interest of the general public," *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911) is one which can best be effectively accomplished when the federal government is the plaintiff; and once the federal government has considered the public interest and then has *acted* by issuing, after public notice and comment, a formal consent order requiring some corporate divestiture, private parties should not be allowed to take a second shot at the corporate target. In short, since divestiture "is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the Government in their unlawful project," *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948), it makes no sense to make divestiture available to private litigants in their own private interest when defendants *cannot* "outdistance the Government" under the HSR Act.[4]

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[4] Section 7A(i)(1) of the HSR Act, entitled "Construction with other laws," provides:

> Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any

California *admits* in its Brief that a less-disruptive pre-merger lawsuit for a preliminary injunction was possible given the HSR notification and waiting procedures used in this case. Petitioner's Brief at 36.[5] It argues however, that the "expense of initiating suit before mergers are completed" and the "practical reality of meeting the burden of proof for a preliminary injunction in a Section 7 case" excuses its delay and militates against upholding the no-divestiture rule. *Id.* But the cost and difficulty of litigation are no reasons to undermine a Congressional scheme designed precisely to *forestall the need* for the extreme, disrupting remedy of post-merger dissolution or divestiture.[6]

If the California Attorney General prevails before this Court, the workers represented by the UFCW will have to pay the price of the state's strategy of "wait and see." Had California enjoined the merger before completion, Alpha Beta and Lucky would have remained viable, separate entities, and eventually the merger would or would

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action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

15 U.S.C. § 18a(i)(1). We do not suggest, of course, that the state attorney general is barred from commencing any "proceeding" or "action" (see note 6 *infra*), but only that the *remedy* he is entitled to under Section 16 should be consistent with the Congressional purpose expressed in the HSR Act.

[5] The California Attorney General received notice of American Stores' first tender offer at the same time the FTC did, on March 21, 1988. The merger was not consummated until June 9, 1988, and the Attorney General filed this lawsuit on September 1, 1988. See Respondents' Brief, Statement of the Case.

[6] Of course, nothing prevented the California Attorney General from seeking, at an early date, a preliminary injunction preserving the *status quo* pending completion of the FTC investigation. And even if the Attorney General is denied the right to request divestiture, he can still obtain prospective injunctive relief and treble damages on behalf of all consumers in the state who must pay higher food prices because of an antitrust violation. *See Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

not have been blocked. In the meantime the employees could have lived with the *status quo*. So too, had California accepted the FTC consent decree as a resolution of its antitrust concerns, the employees and their unions could have made their adjustments and agreements through collective bargaining with the merged employer.

But if California is allowed to ignore the federal consent decree and proceed to trial threatening divestiture or dissolution, the employees are faced with the worst of all possible worlds. After adapting both to the merger itself and the FTC divestiture order, they now will be faced with at least several years of uncertainty about the continued viability of their employer and the impact of any ultimate divestiture order on their jobs. This is not a result which Congress could have intended when it passed the HSR Act. As members of the "business community" and part of the "public interest," the employees represented by the UFCW, like other employees affected by corporate mergers, are entitled to share in the benefits of finality and certainty which Congress intended to provide under the Hart-Scott-Rodino Act.

II. PROVIDING A STATE ATTORNEY GENERAL WITH THE RIGHT TO SEEK DIVESTITURE IN THE CIRCUMSTANCES OF THIS CASE WOULD CONFLICT WITH CONGRESSIONAL LABOR POLICY

Allowing the California Attorney General to sue for divestiture in this case would not only undermine the Hart-Scott-Rodino Act; it would also collide with the Congressionally-created policy of resolving industrial disputes through peaceful collective bargaining. In this case the divestiture order sought by the Attorney General would, by threatening the efficacy and stability of collective bargaining, undermine the policies of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

As we described above, the UFCW unions relied on the federal government's final consent order and attempted to bargain with the newly-merged employer to protect the employees affected by that change in corporate identity. But because of the "hold separate" preliminary injunction and the threat of an eventual final divestiture order, the unions have been unable to accomplish any real stability or certainty. A court-ordered breakup or divestiture of American Stores at the end of this litigation would only aggravate the disruption to a once-stable collective bargaining relationship. More than that, this action has made any collective bargaining virtually impossible while the cloud of a possible divestiture order remains over the parties. As a result, the employees represented by the *amici curiae* have been denied the benefits which federal labor law is supposed to provide them: stable labor relations and protection from the worst effects of unchecked competition. In short, the California Attorney General's request for divestiture puts federal antitrust law in a head-on conflict with the goals of our national labor policy favoring collective bargaining as the means for resolving industrial disputes.

This is, of course, not the first time that the two statutory schemes have come into conflict. This Court has found it necessary on many occasions to resolve the tension between the antitrust policy of promoting free competition in the market for goods and services and the equally-weighty Congressional interest in allowing workers to protect themselves from the effects of such competition through collective bargaining. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 806 (1945). Nowhere is this clearer than in the cases defining labor's "nonstatutory" antitrust exemption in which this Court has endeavored to reconcile the two policies without doing violence to either. *See Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Allen Bradley, supra*. While reconciliation of the national antitrust and labor policies often is a difficult task of balancing interests and concerns to which Congress may have actually given no thought, *see, e.g., Federal Maritime Comm'n v. Pacific Maritime Assoc.*, 435 U.S. 40 (1978) and *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261 (1968), it is inescapable.

In striking this balance, this Court has accommodated not only the statutes' substantive provisions but the remedies available under them as well:

> In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization [and collective bargaining], not only by delineating exemptions from antitrust coverage but also *by adjusting the scope of the antitrust remedies themselves. See, Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

Connell Construction Co., supra, 421 U.S. at 636 (emphasis added). Certain remedies are simply too inherently dangerous to the national policy of fostering stable collective bargaining relations to be permitted.

In a case such as this, a divestiture remedy in the hands of a well-meaning state attorney general may not only burden but block collective bargaining. Our national labor policy therefore requires that the California Attorney General be denied the right to seek divestiture in the particular circumstances of this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: December 1, 1989